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No. 90-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHENEY RAILROAD COMPANY, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the canon of construction known as *expressio unius est exclusio alterius* is a "traditional tool of statutory construction" dispositive of legislative intent under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether individual provisions of the Interstate Commerce Act can be construed independently of the National Rail Transportation Policy, 49 U.S.C. Section 10101a.

PARTIES TO THE PROCEEDING

The following parties appeared in the proceedings before the Court of Appeals below:

Cheney Railroad Company, Inc.,[1]
Petitioner

Interstate Commerce Commission,
Respondent

United States of America,
Respondent

Tyson Foods, Inc.,
Intervening Respondent

CSX Transportation, Inc.,
Intervening Respondent

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[1]Cheney Railroad Company, Inc., has neither a parent company nor any subsidiary companies.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW.....	2
JURISDICTION.....	2
STATUTES INVOLVED.....	3
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION.	18
I. CONTRARY TO PRECEDENT OF THIS COURT AND ANOTHER CIRCUIT THE COURT BELOW HAS FOUND A TRADITIONAL TOOL OF STATUTORY CONSTRUCTION INAPPLICABLE TO ADMINISTRATIVE AGENCY STATUTORY INTERPRETATION....	18
A. Use of the *Expressio* Canon of Statutory Construction is Mandated by the Court's Decision in Chevron.....	23
B. Use of the *Expressio* Tool of Construction is Particularly Appropriate in This Case.....	31
C. This Case Involves Fundamental Issues of Statutory Construction Facing Both Courts and Administrative Agencies.	41

PAGE

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER OR NOT INDIVIDUAL PROVISIONS OF THE INTERSTATE COMMERCE ACT CAN BE READ IN ISOLATION FROM THE NATIONAL RAIL TRANSPORTATION POLICY..... 45

CONCLUSION..... 62

TABLE OF AUTHORITIES

PAGE

CASES:

American Trucking Associations v. United States, 344 U.S. 298 (1953)..... 37

Arizona Electric Power Cooperative, Inc. v. United States, 816 F.2d 1366 (9th Cir. 1987)... 40

Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986)..... 32

Carter v. Director, Office of Workers' Compensation Programs, 751 F.2d 1398 (D.C. Cir. 1985).. 33

Chan v. Korean Air Lines, Ltd., ___ U.S. ___, 109 S. Ct. 1676 (1989)..... 30

PAGE

CASES-continued:

Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985)..... 25

Cheney Railroad Co. v. ICC, 902 F.2d 66 (D.C. Cir. 1990)..... *passim*

Chesapeake and Ohio Railway Co. v. United States, 704 F.2d 373 (7th Cir. 1983)..... 54

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)..... *passim*

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)..... 48

Chicago and North Western Transportation Co. v. United States, 678 F.2d 665 (7th Cir. 1982)..... 4

Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990)..... 13,15

Dole v. United Steelworkers of America, ___ U.S. ___, 110 S. Ct. 929 (1990)..... 42

Eastern-Central Motor Carriers Association v. United States, 321 U.S. 194 (1944)..... 51

PAGE

CASES-continued:

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981)..... 24

FMC v. Seatrain Lines, Inc., 411 U.S. 726 (1973)..... 24

Freight Forwarders Institute v. United States, 409 F. Supp. 693 (N.D. Ill. 1976)..... 56

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)..... 32

ICC v. Parker, 326 U.S. 60 (1945)..... 60

INS v. Cardoza-Fonesca, 480 U.S. 421 (1987)..... *passim*

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)..... 25

Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983)..... 33

Mallard v. United States District Court for the Southern District of Iowa, ___ U.S. ___, 109 S. Ct. 1814 (1989)..... 26

McLean Trucking Co. v. United States, 321 U.S. 67 (1944)..... 49

Russello v. United States, 464 U.S. 16 (1984)..... 28,29

PAGE

CASES-continued:

NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987)..... 20

Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957)..... 50

SEC v. Sloan, 436 U.S. 103 (1978)..... 24

Simmons v. ICC, 871 F.2d 702 (7th Cir. 1989)..... 4

Thomson v. United States, 321 U.S. 19 (1944)..... 37

TRT Telecommunications Corp. v. FCC, 876 F.2d 134 (D.C. Cir. 1989)..... 15

United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir.), *cert. denied*, 453 U.S. 913 (1981)..... 33

United States v. Morse, 95 U.S. 760 (1877)..... 60

United States v. Morton, 467 U.S. 822 (1984)..... 26

West Coast Truck Lines, Inc. v. Arcata Community Recycling Center, Inc., 846 F.2d 1239 (9th Cir.), *cert. denied*, 488 U.S. 856 (1988)..... 40

PAGE

ADMINISTRATIVE CASES:

Cheney Railroad Company - Feeder Line Acquisition - CSX Transportation, Inc. Line Between Greens and Ivalee, AL, 5 I.C.C.2d 251 (1989)..... 10,35

Finance Docket No. 31012, *Cheney Railroad Company, Inc. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between Greens and Ivalee, AL* (not printed), served June 2, 1987..... 9

Finance Docket No. 31012, *Cheney Railroad Company, Inc. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between* Greens and Ivalee, AL (not printed), decisions served 27, 1987; July 19, 1987; August 14, 1987; and December 1, 1987..... 10

Feeder Railroad Development Program, 367 I.C.C. 261 (1983)... 35

Railroad Consolidation Procedures, 366 I.C.C. 75 (1982)..... 31,32

STATUTES:

5 U.S.C. § 706..... 3

5 U.S.C. § 706(2)(A)..... 17,48

28 U.S.C. § 1254(1)..... 3

PAGE

STATUTES-continued:

49 U.S.C. preceding § 1..... 49

49 U.S.C. § 10101..... 49

49 U.S.C. § 10101a..... *passim*

49 U.S.C. § 10101a(1), (4), and (5)..... 16,53

49 U.S.C. § 10505(a)(1)..... 54

49 U.S.C. § 10705(e)..... 54

49 U.S.C. § 10905..... *passim*

49 U.S.C. § 10905(f)(3)..... 36

49 U.S.C. §§ 10905 and 11345..... 12

49 U.S.C. § 10910..... *passim*

49 U.S.C. § 10910(b)(1)(A)(i)..... 8,15

49 U.S.C. § 10910(b)(1)(A)(ii).... 7,38

49 U.S.C. § 10910(c)(1)..... 57

49 U.S.C. § 10910(c)(1)(C) and (D)..... 17,57

49 U.S.C. § 10910(k)..... 7

49 U.S.C. §§ 11344-45..... 31

49 U.S.C. § 11345..... 3

49 U.S.C. § 11345(b) and (c)..... 32

49 U.S.C. § 11345(d)..... 31,32

PAGE

PUBLIC LAWS:

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895..... *passim*

Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898..... 49

LEGISLATIVE MATERIALS:

H.R. Rep. No. 96-1035, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978..... 53

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110..... 52

126 Cong. Rec. H8608 (daily ed. Sept. 9, 1980)..... 35,36

REGULATIONS:

49 C.F.R. Part 1151..... 3

49 C.F.R. § 1151.2..... 39

49 C.F.R. § 1151.2(d)..... 7

49 C.F.R. § 1180.2..... 32

PAGE

SECONDARY AUTHORITIES:

ABA Section of Administrative Law, *Judicial Review of Administrative Action in a Conservative Era,* 39 Admin. L. Rev. 353 (1987)..... 23

R. Dickerson, The Interpretation and Application of Statutes (1975)..... 32

Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 Colum. L. Rev. 452 (1989)..... 22

Posner, *Statutory Interpretation--In the Classroom and in the Courtroom,* 50 Univ. of Chi. L. Rev. 800 (1983)..... 34

Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 Duke L.J. 511..... 26,42

Shapiro & Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law,* 1988 Duke L.J. 819..... 22

Silberman, Chevron--*The Intersection of Law and Policy,* 58 Geo. Wash. L. Rev. 821 (1990).... 22

Sunstein, *Interpreting Statutes in the Regulatory State,* 103 Harv. L. Rev. 405 (1989)..... 43

PAGE

SECONDARY AUTHORITIES-continued:

Note, *Intent, Clear Statements, and the Common Law Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892 (1982)..... 29

The D.C. Circuit Review, *Administrative Law:* Chevron *and Canons of Statutory Construction*, 58 Geo. Wash. L. Rev. 829 (1990)..... 44

The Oxford Dictionary of Quotations (2d ed. 1953)..... 48

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-

CHENEY RAILROAD COMPANY, INC., PETITIONER
v.
INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cheney Railroad Company, Inc., petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit denying its petition for review of decisions of the Interstate Commerce Commission.

OPINIONS BELOW

The opinion of the court below (App. A, 1a-25a)[1] is reported at 902 F.2d 66 (1990). The order denying rehearing (App. B, 26a-30a) is reported at 902 F.2d at 71 (1990). The court's order denying *en banc* rehearing (App. C, 31a-32a) is unreported.

JURISDICTION

The judgment of the court below was entered April 27, 1990; the orders denying rehearing and rehearing *en banc* were entered June 28, 1990. On August 31, 1990, the time period in which to file this petition was extended thirty days. The jurisdiction of this Court is invoked

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[1]This and subsequent references in parentheses are to the separate Appendix; its page numbers are identified by an "a" suffix.

under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Administrative Procedure Act, 5 U.S.C. Section 706, and Interstate Commerce Act, 49 U.S.C. Sections 10101a, 10905, 10910 and 11345, and regulations of the Interstate Commerce Commission, 49 C.F.R. Part 1151, are set forth in Appendix D (33a-60a).

STATEMENT OF THE CASE

The amended Interstate Commerce Act allows qualified interested parties to purchase rail lines which rail carriers no longer wish to operate, in order to promote continued freight transportation

to the areas served by such lines. 49 U.S.C. §§ 10905, 10910. *See generally Simmons v. ICC,* 871 F.2d 702 (7th Cir. 1989); *Chicago and North Western Transportation Co. v. United States,* 678 F.2d 665 (7th Cir. 1982). Under 49 U.S.C. Section 10910, known as the feeder line statute, the Interstate Commerce Commission ("ICC" or "Commission") can require the sale of a line to a qualified applicant if certain conditions spelled out in the statute are met. This petition challenges the ICC's policy of simultaneously reviewing, and eventually approving, multiple applications for the same segment of line, and the reviewing court's reasoning in affirming that policy. This petition also questions the

refusal by that court to review the ICC's consideration of the relative effects on competition which granting two applications will have, where one applicant spoils the competitive position of the other.

This case arises out of an attempt to purchase and operate 54.61 miles of rail line extending between Greens and Ivalee, Alabama. In 1983 the line was designated as a candidate for eventual abandonment by its then owner, Seaboard System Railroad, Inc., which later merged into CSX Transportation, Inc. ("CSXT"). Because the rail line provided an essential means of transportation to and from the Graystone, Alabama, plant of Cheney Lime & Cement Company, the owner of that

limestone products company, Alan B. Cheney, decided to form Cheney Railroad Company, Inc. ("Cheney"), and purchase the line. Negotiations were unsuccessful, however, as CSXT conditioned sale of the line on unreasonable terms and conditions, such as an agreement by Cheney not to handle overhead traffic.[2]

Cheney refused to accede to such demands, as the line's ultimate viability was dependent upon the amount of overhead traffic it could attract and retain. In March of 1987 Cheney filed an application with the ICC to force the sale of the line

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[2]"Overhead traffic" is comprised of those rail shipments which neither originate nor terminate on the subject rail line, but rather pass over it from and on to other rail lines. During negotiations CSX had been siphoning off overhead traffic carried on the line and rerouting it on another of its lines.

upon terms and conditions to be set by the Commission, pursuant to the authority granted under the feeder line statute.[3]

Under its regulations, the Commission will accept applications from other parties interested in acquiring the line for thirty days following filing of the primary application. 49 C.F.R. § 1151.2(d).[4] On the last day on which the Commission would accept competing applications, an application was received

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[3]Under the feeder line statute, a line which is designated on a rail carrier's system diagram map as slated for abandonment, but for which an abandonment application has yet to be filed, is eligible for forced sale. 49 U.S.C. § 10910(b)(1)(A)(ii).

[4]49 U.S.C. Section 10910(k) granted to the Commission the authority to "prescribe such regulations and procedures as may be necessary to carry out the provisions of this section." Cheney's challenge to the Commission's policy of accepting and considering competing applications for the same segment of rail line is the first since the regulation was promulgated.

from Tyson Foods, Inc. ("Tyson"), not for the entire 54.61 miles, but only for the 1.46 miles at the northeast end of the line at Ivalee (along with an additional .15 mile segment not sought by Cheney).[5]

Tyson sought that segment of line to provide rail service to a facility it had just recently decided to construct in the immediate vicinity of that line segment. From the outset it was apparent that if the Tyson application was approved by the Commission and the sale ultimately consummated, Tyson would operate an industrial spur serving only its new plant, thus cutting what had once been

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[5]Because this .15 mile segment was not designated as a candidate for abandonment on CSXT's system diagram map, it could only be purchased if the ICC were to find its sale was consistent with the public convenience and necessity. 49 U.S.C. § 109010(b)(1)(A)(i).

part of a Birmingham-Atlanta main line. Cheney would be effectively prevented from participating in overhead traffic movements, because Tyson had expressed an intention in its application to refrain from carrying overhead traffic.[6]

Rather than consider the applications in the sequential order received, as Cheney requested in a preliminary motion, the ICC interpreted the feeder line statute to allow simultaneous consideration of the applications.[7] The

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[6]Discovery later elicited the fact that Tyson was reluctant to enter the rail business at all, and that CSXT had actually drafted Tyson's feeder line application for it. Moreover, the operations Tyson contemplated would prevent overhead movement whenever Tyson was unloading freight at its facility, as Tyson did not plan to build sidings which would clear unloading freight cars off the line and allow for passage of other traffic.

[7]Finance Docket No. 31012, *Cheney Railroad Company, Inc. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between Greens and Ivalee, AL* (not printed), served June 2, 1987.

Commission, in discovery orders, also rejected Cheney's arguments that the anti-competitive aspects of the CSXT-Tyson arrangement should be fully explored in examining the relative merits of Tyson's limited proposal.[8] After a delay of nearly two years, the Commission approved both applications, ordering the sale of the entire line on terms and conditions which it established.[9] Most importantly, it delegated to CSXT the task of deciding which of the two applicants would be

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(App. F, 168a-175a).

[8]Finance Docket No. 31012, *Cheney Railroad Company, Inc. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between Greens and Ivalee, AL* (not printed), decisions served May 27, 1987; July 19, 1987; August 14, 1987; and December 1, 1987. (Apps. G to J, 176a-263a).

[9]*Cheney Railroad Company - Feeder Line Acquisition - CSX Transportation, Inc. Line Between Greens and Ivalee, AL*, 5 I.C.C.2d 251 (1989). (App. E, 61a-167a).

permitted to purchase the 1.46 miles of line both sought.[10]

As expected, CSXT chose Tyson as the purchaser of the 1.46 miles, eliminating competition for overhead traffic and thus imperiling the long term prospects for Cheney's operation of the remainder of the line. Cheney sought judicial review of the Commission's decisions by the United States Court of Appeals for the District of Columbia Circuit, asserting that, *inter alia*, the ICC had misinterpreted the feeder line statute in simultaneously considering competing applications, and that the Commission had been arbitrary and capricious in approving the Tyson application despite its anti-competitive

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[10]*Id.* at 276. (App. E, 160a).

ramifications.

Cheney's primary argument on the feeder line statute was based on the fact that elsewhere in the amended Interstate Commerce Act, in provisions enacted simultaneously with the feeder line program, Congress had expressly authorized the Commission to consider competing applications in proceedings involving the purchase of rail lines.[11] In stark contrast, the feeder line statute, which in earlier legislative drafts had contemplated consideration of multiple applications for the same line, was entirely mute on this point in its final

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[11] *See* 49 U.S.C. §§ 10905 and 11345. 49 U.S.C. Section 10905 is especially relevant because it is the post-abandonment equivalent of the feeder line statute, as interested parties can apply within a limited time period to purchase rail lines the ICC has authorized owning carriers to abandon.

version. Cheney urged, as it had before the Commission, that the comparative silence between the complementary sections of the statute established that Congress did not intend to permit the Commission to simultaneously consider competing applications for the same feeder rail line.

The court rejected Cheney's argument, taking the opportunity to hold that such a method of statutory construction - long known as *expressio unius est exclusio alterius* - was in its view illegitimate in the administrative context.[12] The court

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[12]*Cheney Railroad Co. v. ICC*, 902 F.2d 66 (D.C. Cir. 1990) (App. A, 1a-25a). The court interpreted the ancient expression to mean that ""explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context.'" Id. at 68 (quoting *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 779 (D.C. Cir. 1990)) (App. A, 10a). The court's criticism of the

read *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984), as a mandate that Congressional silence on an issue can only be interpreted to mean that Congress was leaving to the agency the resolution of the issue, because under *Chevron* an agency has been delegated reasonable discretion to answer all questions that Congress has

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expressio canon was explained:

> Scholars have long savaged the *expressio* canon. Max Radin called it "one of the most fatuously simple of logical fallacies, the 'illicit major,' long the *pons asinorum* of schoolboys." The Supreme Court has more charitably dubbed it "a valuable servant, but a dangerous master." Whatever its general force, we think it an especially feeble helper in the administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.

Id. at 68-69 (citations omitted) (App. A, 11a-12a).

not directly resolved.[13] The court felt that contrasting legislative silence, standing alone, "can rarely if ever be the 'direct' congressional answer required by *Chevron*."[14]

Cheney's claim regarding the anti-competitive aspects of the Tyson application was based on the Commission's obligation under 49 U.S.C. Section 10910 to examine Tyson's purchase in accordance with the public interest standard implicit in the statute's use of the phrase "public convenience and necessity."[15] Cheney

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[13]902 F.2d at 69 (App. A, 12a-13a). As precedent for this proposition, the court cited only to recent decisions of its own circuit. *See Clinchfield Coal v. FMSHRC*, 895 F.2d at 779; *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146 (D.C. Cir. 1989).

[14]902 F.2d at 69 (App. A, 13a).

[15]49 U.S.C. § 10910(b)(1)(A)(i). While only the additional .15 mile segment that Tyson alone sought is subject to this standard, the parties treated the two segments Tyson sought as

argued that the Commission should have paid greater heed to the competitive ramifications of a successful Tyson application, because the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), of which the feeder line program was a part, carried a congressional instruction to the ICC that it was to administer the amended Interstate Commerce Act so as to ensure effective competition among rail carriers. This instruction is codified in the National Rail Transportation Policy, 49 U.S.C. Section 10101a.[16]

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inseparable, as the .15 mile segment would have been worthless to Tyson without the other 1.46 miles of line. 902 F.2d at 70 (App. A, 21a-22a). Cheney's argument on public interest grounds was directed at this "package" of lines Tyson sought, as it was with this package that competition for overhead traffic is prevented.

[16] *See, e.g.*, 49 U.S.C. § 10101a(1), (4) and (5).

The appeals court, however, read the feeder line statute as in part hostile, with the remainder at best silent, to the goal of maintaining effective competition, so it refused to examine the ICC's decision against the "arbitrary and capricious" standard of 5 U.S.C. Section 706(2)(A).[17] Interpreting the statute in isolation from the rest of the Interstate Commerce Act, the court did not even reach the merits of Cheney's arguments on

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[17]902 F.2d at 70 (App. A, 22a-24a). The feeder line statute prohibits the Commission from finding the public convenience and necessity permit a forced sale if such a sale would have a "significantly adverse financial effect on" or "an adverse effect on the overall operational performance of" the incumbent rail carrier operating the line. 49 U.S.C. § 10910(c)(1)(C) and (D). The court felt such requirements indicated that "competition cuts against, not for" Cheney's argument that the public interest would be better served by the competition for overhead traffic its rail service would provide, as opposed to that contemplated by Tyson's application. 902 F.2d at 70 (App. A, 23a).

competition, but rather affirmed the ICC's conclusions on grounds the Commission itself did not espouse.[18]

REASONS FOR GRANTING THE PETITION

I. CONTRARY TO PRECEDENT OF THIS COURT AND ANOTHER CIRCUIT THE COURT BELOW HAS FOUND A TRADITIONAL TOOL OF STATUTORY CONSTRUCTION INAPPLICABLE TO ADMINISTRATIVE AGENCY STATUTORY INTERPRETATION

It is readily apparent that the court below has adopted an exceedingly deferential method of reviewing agency statutory interpretation, one at odds with existing Supreme Court precedent. In

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[18]Because the court felt that the potential for competition was irrelevant to the Commission's authority to order sales under the feeder line statute, it also avoided addressing the propriety of the ICC's decisions almost totally denying discovery by Cheney of facts it sought from CSXT and Tyson necessary to fully examine the competition issues. *See* ICC decisions cited in note 8, *supra*.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("*Chevron*"), this Court established a standard of judicial review of agency interpretation of statutes the agency has been charged with administering, by stating that:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

> permissible construction of the statute.
>
> [9]The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, *employing traditional tools of statutory construction,* ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 842-43 (emphasis added) (citations and footnotes 10 and 11 omitted). *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (regardless of agency's interpretation of statute, if court can "determine congressional intent using traditional tools of statutory construction . . . that interpretation must be given effect").

The court below has now decided that one traditional tool of statutory construction, the canon of construction known as *expressio unius est exclusio alterius,* is inapplicable to the interpretation of administrative statutes, as there almost always will be a question as to whether comparative Congressional silence connotes forbiddance or simply is an implicit delegation to the agency to decide the issue. In such instances, the reviewing court, under the regime established by the decision at issue, is to defer to the administrative agency's reasonable construction of that silence.

Such a decision, however, while invoking *Chevron*, not only contradicts the plain language of that decision, but also

Supreme Court precedent cited there, this Court's application of the principles articulated in that opinion, and a holding of the United States Court of Appeals for the Ninth Circuit. If allowed to stand, such an approach to judicial review of agency statutory interpretation has the potential to lead to a significant abdication of reviewing court authority, as it requires a precision in the communication of legislative intent that is present only in increasingly rare instances. *See* Silberman, Chevron--*The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 825 (1990).[19] The

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[19]*See also* Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 468-69 n. 67 (1989) (literal reading of *Chevron* adopts standard of statutory clarity and specificity that will be difficult for Congress to meet); Shapiro & Glicksman, *Congress, the Supreme Court, and the*

decision has added importance, for it comes from the Court of Appeals from the District of Columbia Circuit, the leading lower court for review of federal administrative agency decisions, and a court that is looked to by the other circuits for guidance in the area of administrative law and procedure.

A. Use of the *Expressio* Canon of Statutory Construction is Mandated by the Court's Decision in *Chevron*

The Court should grant this petition because neither *Chevron* nor any of its

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Quiet Revolution in Administrative Law, 1988 Duke L.J. 819, 859 (few statutes are absolutely clear); Panel Discussion, ABA Section of Administrative Law, *Judicial Review of Administrative Action in a Conservative Era*, 39 Admin. L. Rev. 353, 369 (1987) (statutory construction much more complicated than search for direct decision of precise questions) (remarks of Professor Sunstein).

progeny call for the exacting requirement of congressional specificity the court below has imposed. Some of the cases cited in *Chevron* derived legislative intent not only from the language employed by the Congress, but also from the implication of legislative silence on an issue,[20] particularly when compared with contemporaneous, related statutes.[21]

Similarly, this Court's application of the *Chevron* principles of judicial

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[20]*See, e.g., SEC v. Sloan*, 436 U.S. 103, 112-14 (1978) ("in light of explicit congressional recognition in other sections of Act both past and present" of necessary preconditions to agency's exercise of power, difficult to read silence on preconditions as nevertheless authorizing agency to exercise identical powers); *see also FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 36 (1981) (statute did not "by necessary implication" foreclose regulatory body's interpretation of statute).

[21]*See FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 742 (1973) (comparing unambiguous language in contemporaneous and related statutes to overturn agency interpretation of authority based on ambiguous statutory language).

review have not been as overly literal as that of the court below, as the Court consistently examines whether Congress has "directly addressed the precise question at issue" by looking at such factors as the design and structure of the entire statute, and not just the provision in question. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985). The fundamental concepts that a statute should be construed as a whole, and that the meaning of a statute can become apparent from its relationship with other laws, have thus been discarded, at least in the administrative context, by the court

below. *See United States v. Morton*, 467 U.S. 822, 828 (1984); Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521.

It is well established that the most natural comparison to make, when attempting to derive the meaning of a specific statutory provision, is with similar provisions in the same statute, especially when those provisions have been enacted at the same time. *See, e.g., Mallard v. United States District Court for the Southern District of Iowa*, ___ U.S. ___, ___, 109 S. Ct. 1814, 1818 (1989). This truism applies regardless of whether or not an administrative agency is charged with interpreting the statute in

the first instance. Thus, in *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987), the Court held that because Congress imposed a different statutory standard to determine whether an alien in this country should be granted political asylum, as opposed to the statutory standard used when deciding whether an alien should not be deported because of the potential for political persecution in her home country, the agency implementing the standards cannot construe them to mean the same thing. The Court expressly stated that "'[w]here Congress includes particular language in one statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

or exclusion.'" *Id.* at 432.[22]

Under the principle espoused by the court below, however, the Immigration and Naturalization Service would have been permitted to construe the two standards identically, as Congress' failure to communicate an express intent to prohibit such an interpretation would have been read as a delegation to the INS of the authority to interpret the statute in any way that would reach a reasonable result. The court below was of the opinion that such a degree of deference to agency interpretation was called for by *Chevron*. When advanced by the government in *Cardoza-Fonesca*, however, such reasoning

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[22]The Court directly quoted from *Russello v. United States*, 464 U.S. 16, 23 (1984), discussed in greater detail below.

was quickly dispatched by the Court as contrary to the principles established in *Chevron*. *INS v. Cardoza-Fonesca*, 480 U.S. at 445-48.

This Court's discussion of the dispositive method of statutory construction in *INS v. Cardoza-Fonesca* is also relevant because the portion of that opinion quoted succinctly describes the canon of statutory construction denigrated by the court below. In recent years this Court on numerous occasions has applied the *expressio* canon, also known as the doctrine of negative implication, to derive congressional intent.[23] In

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[23]*See generally* Note, *Intent, Clear Statements, and the Common Law Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 895-96 (1982) (detailing Court's use of *expressio unius est exclusio alterius* maxim to resolve increasingly complex statutory issues).

Russello v. United States, 464 U.S. 16, 23 (1984), quoted above in *Cardoza-Fonesca*, this Court applied the maxim to defeat a restrictive definition of a term in a criminal statute urged by the petitioner defendant, because Congress, in related sections of the same statute, evidenced an intent that when it wanted to limit the reach of the term at issue, it did so by writing the statute that way. *See also Chan v. Korean Air Lines, Ltd.*, ___ U.S ___, ___, 109 S. Ct. 1676, 1683 (1989) (art of legislative draftsmanship will become obsolete when power can be implied in silent treaty provision despite fact that such power was expressly granted in parallel provisions of same treaty). The Court below has plainly erred in reading

Chevron as hostile to use of the *expressio* canon in interpreting administrative statutes.

B. Use of the *Expressio* Tool of Construction is Particularly Appropriate in This Case

The refusal of the court below to use the *expressio* tool of construction in construing the Staggers Act amendments to the Interstate Commerce Act is especially disconcerting, given the fact that the canon is normally employed only in narrowly drawn circumstances, and this was one of those circumstances.[24] *See*

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[24]The ICC itself has used the *expressio* canon to find that the Staggers Act prohibits competing applications for lines sought to be purchased as part of what the Commission refers to as "minor" rail merger transactions under 49 U.S.C. Section 11345(d). *See Railroad Consolidation Procedures*, 366 I.C.C. 75 (1982). In Section 228 of the Staggers Act, Congress reformed the ICC approval process for rail industry mergers. 94 Stat. at 1931-34 (codified at 49 U.S.C. §§ 11344-45). In so doing, it created three different categories of

generally R. Dickerson, The Interpretation and Application of Statutes 234-35 (1975). The canon is not a principle of law, but rather an aid to statutory construction. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986). As such, it will not be applied to override strong, contrary indicia of legislative intent. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (*expressio*, like other statutory canons, subordinated to

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mergers, which the Commission has come to refer to as major, significant and minor transactions. 49 C.F.R. § 1180.2. Because Congress, in 49 U.S.C. Section 11345(b) and (c), expressly allowed third parties to file competing applications for merger approval in major and significant transactions, but did not so provide for minor transactions in Section 11345(d), the Commission presumed the omission was intentional and thus refuses to accept competing applications in minor rail merger transactions. *Railroad Consolidation Procedures*, 366 I.C.C. at 83-84 (codified at 49 C.F.R. § 1180.4(d)(4)(i)).

doctrine that courts will construe details of an act in conformity with act's dominant general purpose). Similarly, if there is another obvious explanation, besides purposeful exclusion, for the legislature's failure to supply the absent term or provision, the *expressio* canon will not apply.[25]

In addition, the two or more statutory provisions being compared must be closely related, to the extent that *in pari materia* construction is appropriate.[26] Finally, it is more

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[25]*See, e.g., Carter v. Director, Office of Workers' Compensation Programs*, 751 F.2d 1398, 1401-02 (D.C. Cir. 1985).

[26]*Compare Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197 (6th Cir. 1983) (*expressio* canon applied to interpret contrasting chapters of Bankruptcy Act) *with United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1232 (D.C. Cir.) (crucial difference between Occupational Safety and Health Act and Coal Act prevents two from being reliably compared), *cert. denied*, 453 U.S. 913

probative of legislative intent that Congress at some point have considered including the absent provision, than if the failure to do so was simply because such an action did not occur to Congress. *See* Posner, *Statutory Interpretation--In the Classroom and in the Courtroom,* 50 Univ. of Chi. L. Rev. 800, 813 (1983).

All of these conditions are present in the instant case. 49 U.S.C. Sections 10905 and 10910 are ideal candidates for *in pari materia* construction. The Staggers Act, when it added the feeder line statute to the Interstate Commerce Act to provide for pre-abandonment forced sales, at the same time expanded the post-abandonment sale provision, Section 10905,

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(1981).

to provide for forced sales. Pub. L. No. 96-448 § 402, 94 Stat. at 1942-45.[27] In fact, earlier versions of the Staggers Act would have codified both pre-abandonment and post-abandonment forced sale provisions in the same section. *See* 126 Cong. Rec. H8608, H8622 (daily ed. Sept. 9, 1980). The two statutory provisions employ many of the same concepts, and the Commission has often borrowed from its Section 10905 procedures and standards to give content to Section 10910, including in the decision at issue here.[28]

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[27]49 U.S.C. Section 10905 existed prior to the enactment of the Staggers Act in 1980, but provided only for the voluntary transfer of abandoned rail lines by the owning carriers.

[28]*See, e.g., Feeder Railroad Development Program*, 367 I.C.C. 261 (1983); *Cheney Railroad Company - Feeder Line Acquisition - CSX Transportation, Inc. Line Between Greens and Ivalee, AL*, 5 I.C.C.2d at 268 (App. E, 129a).

A major difference, however, between Section 10905 and 10910, is that the former provision expressly contemplates that more than one application may be filed to purchase the same rail line, while the latter does not. *See* 49 U.S.C. § 10905(f)(3). That this disparate treatment on the part of Congress was intentional is supported by the legislative history. There is ample evidence that Congress at one point contemplated providing for competing applications in the pre-abandonment forced sale process, as the House version of the feeder line statute contained just such a provision. *See* 126 Cong. Rec. at H8623 (adding new Section 10911(d)(1)(C)).

In the House-Senate Conference

Committee's formulation of the final version of the feeder line statute, however, this provision was dropped. It is clear, therefore, that Congress considered the possibility of competing feeder line sales when drafting the statute, but nevertheless failed to allow for them in the enacted law, thus satisfying another of the conditions for application of the *expressio* canon.[29]

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[29]The court below paid little heed to this legislative history, relying on precedent of this Court that the ICC is not barred from exercising authority that Congress had previously extended to the Commission but had deleted upon reenactment. 902 F.2d at 69 (App. A, 14a-15a). In the case cited, however, *American Trucking Associations v. United States*, 344 U.S. 298, 309-10 and n.10 (1953), the Court was construing a statute in which it had already used legislative history to find that the deletion carried no substantive import, but was purely for purposes of clarification. *See Thomson v. United States*, 321 U.S. 19, 23 (1944). In contrast, there is no recorded explanation in the Staggers Act why the provision for competing feeder line applications was dropped.

On the whole, the court below misunderstood Cheney's use of legislative history. The deletion

Lastly, application of the *expressio* canon to prohibit ICC consideration of competing applications is not contrary to any dominant legislative intent of the feeder line statute. The ICC rationalizes its consideration of competing feeder line applications because of the need to hasten the forced sale process, a goal thought to be consistent with the feeder line program's general purpose.[30] On review,

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of the provision at issue in the Conference Committee may not by itself establish a legislative intent to prohibit ICC consideration of competing applications, but when compared with the contemporaneous amendment to 49 U.S.C. Section 10905, adding a provision for competing applications, it is clearly probative of legislative intent on the matter.

[30] 5 I.C.C.2d at 254 (App. E, 76a). The Commission's asserted policy basis for allowing competing applications - to prevent undue delay by ruling on applications individually - is itself questionable, as the instant case demonstrates. Under 49 U.S.C. Section 10910(b)(1)(A)(ii), the Commission's role is a relatively simple one, as its sole task is to determine the financial viability of the proposed new owner of the line

the court simply found the Commission to have reasonably interpreted what it thought was an ambiguous facet of the statute.[31] The court below, however, did not find the Commission's construction of the feeder line statute to be a required interpretation. Under *Chevron,* as a pure policy decision, the Commission's interpretation cannot be used to override contrary legislative intent, which in this instance is established by the negative

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sought to be purchased. This task should take no more than a few months. In fact the Commission's own regulations impose such a timetable for decisions on feeder line applications. *See* 49 C.F.R. § 1151.2. Because it accepted both the Cheney and Tyson applications for simultaneous consideration, however, it took nearly two years for the Commission to ultimately decide that both should be permitted to purchase the 1.46 miles of track at issue, far exceeding the predicted regulatory timetable and significantly delaying the eventual sale of the line.

[31] 902 F.2d at 69 (App. A, 15a-17a).

implication arising from Congress' contrasting failure to expressly provide for competing applications in the feeder line statute.

None of this mattered to the court below, however, as it sees no need to adhere to the *expressio* canon of construction, particularly in the administrative context. Such reasoning is in direct conflict with that of the United States Court of Appeals for the Ninth Circuit, which has described the canon as one of the "most basic" and has used it to interpret changes made to the Interstate Commerce Act by the Staggers Act. *See Arizona Electric Power Cooperative, Inc. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987); *see also West Coast Truck*

Lines, Inc. v. Arcata Community Recycling Center, Inc., 846 F.2d 1239, 1244 (9th Cir.) (using *expressio* canon to derive meaning from Interstate Commerce Act sections amended by Motor Carrier Act of 1980), *cert. denied,* 488 U.S. 856 (1988). The Court should grant this petition to resolve the conflict and authoritatively rule on whether the *expressio* canon truly is one of "the traditional tools of statutory construction" referred to by the decision in *Chevron*.

C. This Case Involves Fundamental Issues of Statutory Construction Facing Both Courts and Administrative Agencies

This case presents the Court with the opportunity to further elucidate the *Chevron* principles. While it is becoming increasingly obvious that there is some

disagreement as to exactly what interpretative methods are to be recognized as "traditional tools of statutory construction" under *Chevron*, *see* Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. at 520-21, the long established maxims, such as the *expressio* canon, were thought to be accepted as particularly useful in ascertaining legislative intent. Just last term the Court, citing the traditional tools language, used the maxim *"noscitur a sociis"* in overturning an agency interpretation of law. *See Dole v. United Steelworkers of America*, ___ U.S. ___, ___, 110 S. Ct. 929, 934-35 (1990).

Nevertheless, the court below has now

taken upon itself the task of reopening the issue, and deciding whether or not certain canons of statutory construction should be applied in the administrative context. While criticism at times has been leveled at almost all of the traditional tools of statutory construction, including *expressio*, there are nonetheless legitimate arguments to be made on behalf of their utility. *See, e.g.*, Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 451-59 (1989) (defending use of canons, including *expressio*, to interpret administrative laws). For every "scholar" who has "savaged" the *expressio* canon of construction, others have found it helpful, including in the administrative

context. *See, e.g., The D.C. Circuit Review, Administrative Law:* Chevron *and Canons of Statutory Construction,* 58 Geo. Wash. L. Rev. 829, 839 (1990) (*expressio* canon, as statute-defining canon, clearly helpful in interpreting statutory language and determining congressional intent under *Chevron*).

This case assumes importance beyond the utility of the *expressio* canon, because the reasoning adopted by the court below is potentially applicable to many other canons of statutory construction when used in the administrative context. If lower courts begin to require legislative precision to the degree demanded by the court below, many of the "traditional tools of statutory

construction" will become useless in establishing the legislative intent behind administrative statutes. The Court should act now to resolve what is turning out to be an increasing conflict and divergence in the application of the principles enunciated in *Chevron*.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER OR NOT INDIVIDUAL PROVISIONS OF THE INTERSTATE COMMERCE ACT CAN BE READ IN ISOLATION FROM THE NATIONAL RAIL TRANSPORTATION POLICY

The court below also made a fundamental error when it refused to review the ICC's decisions regarding the anticompetitive nature of Tyson's feeder line application. Under the Interstate Commerce Act and well-established precedent, that court, in order to

determine whether or not the ICC acted arbitrarily or capriciously, should have reviewed the ICC's actions for conformity with the National Rail Transportation Policy, as codified at 49 U.S.C. Section 10101a.

One of Cheney's main arguments before the ICC was that its feeder line application should be favored over Tyson's because Cheney's operations held out the prospect that Cheney could compete with CSXT for overhead traffic. The Commission discounted this possibility, after refusing to compel as necessary discovery requests made by Cheney for information about overhead traffic specifics and anticompetitive conduct that CSXT and/or Tyson would have knowledge of. Because it

thus failed to perceive any real difference between the applications, the Commission refused to favor either applicant over the other, leaving the task to a hardly disinterested CSXT.

Cheney challenged the decisions of the Commission on competition issues as arbitrary and capricious in the court below. The court, however, rather than examine those decisions, read the feeder line statute *de novo* as in part hostile, with the remainder irrelevant, to Cheney's competition arguments.[32] It thus saw no

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[32]*See supra*, note 16. The court stated that:

> Cheney uses the anticompetitiveness line as a doctor uses the red-rubber hammer, expecting our knees to jerk. But even if it were clear that CSX put Tyson up to the deal, with the aim of reducing the risk of competition from Cheney for overhead traffic, the fact would not get Cheney where it wants to go. Section 10910 does not preclude a carrier forced to sell track it would rather abandon from using such a

reason to make that searching and careful inquiry into the basis for the Commission's decisions which is required by the Administrative Procedure Act, 5 U.S.C. Section 706(2)(A). *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). In so doing, the court below interpreted the feeder line statute in isolation, ignoring nearly fifty years of Supreme Court precedent in the process.

The revised Interstate Commerce Act is not a compilation of individual

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strategem to minimize the adverse consequences.

902 F.2d at 70 (App. A, 23a-24a). Ironically, the court adopted the attitude of rail carriers which gave rise to the Interstate Commerce Act, as best expressed by William Henry Vanderbilt's exclamation, "The public [interest] be damned." The Oxford Dictionary of Quotations 551, line 12 (2d ed. 1953).

statutes, but rather is an attempt to provide a comprehensive system for economic regulation of interstate transportation. Ever since the Transportation Act of 1940, Congress has provided instruction to the ICC to guide the implementation of its mandate under the Interstate Commerce Act. These guidelines originally pertained to all transportation modes, and were designated as the National Transportation Policy. *See* Pub. L. No. 785 § 1, 54 Stat. 898, 899 (codified at 49 U.S.C. preceding § 1 and later recodified at 49 U.S.C. § 10101).

This Court quickly realized the importance of the policy factors enumerated therein. In *McLean Trucking Co. v. United States*, 321 U.S. 67, 82

(1944), the Court held that the policy "is the Commission's guide to the public interest." Later, in *Schaffer Transportation Co. v. United States*, 355 U.S. 83 (1957), the Court recognized that the National Transportation Policy

> is to govern the Commission in the administration and enforcement of *all* provisions of the [Interstate Commerce] Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. Of course the Commission possesses a "wide range of discretionary authority" . . . But that discretion must be exercised in conformity with the declared policies of the Congress. . . . [W]e would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.

Id. at 87-88 (emphasis added) (citations

omitted). *See also Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 209-10 (1944).

For forty years the National Transportation Policy remained unchanged, until the Staggers Act in 1980. With that Act, Congress made two significant changes. First, it established a National Rail Transportation Policy, separate from the policy which would govern other modes. *See* Pub. L. No. 96-448 § 101, 94 Stat. at 897-98 (codified at 49 U.S.C. § 10101a). The importance of this policy was in no way diminished, however, as Congress stated that "[t]he new section [of the Interstate Commerce Act] establishes a specific rail transportation policy to guide the Commission in its duties in

regulation of the railroad industry." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 80, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4111.

The second change wrought was the new focus of the enumerated factors. Whereas the previous National Transportation Policy was completely silent on the issue of competition, the new rail policy contained a number of announcements that it was to be the policy of the government that there be "effective competition" in the rail industry. *See, e.g.*, 49 U.S.C. § 10101a(1), (4), and (5).[33] The

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[33]The policy specifically states that

> [i]n regulating the railroad industry, it is the policy of the United States Government-
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for

legislative history confirms this, noting that the goal of the new policy was to "mov[e] the industry toward more aggressive competition." H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 54, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 3999.

It was against this backdrop that the feeder line statute, along with other provisions of the Staggers Act, was enacted. Since 1980, both the Commission

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transportation by rail;

* * *

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

* * *

49 U.S.C. § 10101a.

and reviewing courts have judged the Commission's rail regulatory actions against the factors enumerated by the National Rail Transportation Policy. While some Interstate Commerce Act statutory provisions expressly incorporate the factors,[34] the Commission's exercise of authority under each provision of the amended Act is to be guided by that policy, including the factors stressing the need for effective competition. *See Chesapeake and Ohio Railway Co. v. United States*, 704 F.2d 373, 375-76 (7th Cir. 1983) (setting aside as not supported by substantial evidence Commission's decision under 49 U.S.C. § 10705(e) approving rail carrier's cancellation of joint rates and

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[34]*See, e.g.*, 49 U.S.C. § 10505(a)(1).

holding that public interest in preserving competition is "explicit in the national transportation policy for railroads, 49 U.S.C. § 10101a, which is to guide the Commission in applying the rail provisions of the Interstate Commerce Act").

The court below, however, totally ignored the National Rail Transportation Policy factors in interpreting the feeder line statute. It did not attempt to reconcile the feeder line statute provisions with any of the enumerated policy factors, but instead read the statute as antithetical to, or unaffected by, Congress' concern for the maintenance and promotion of effective competition. In so doing it cast off the method of reviewing ICC action this Court, as

outlined hereinbefore, established and others have followed for nearly five decades. *See, e.g., Freight Forwarders Institute v. United States,* 409 F. Supp. 693, 706 (N.D. Ill. 1976) (remanding to ICC because National Transportation Policy must be taken into account by ICC in any action it might take). The effect of the court's action is to deprive Cheney of the benefit of full judicial review the Administrative Procedure Act promises.

Highlighting the court's error is the fact that the ICC never held that competitive concerns are irrelevant to the exercise of its feeder line authority. The court below was plainly putting an unwarranted and erroneous judicial gloss on the statute. There is no basis to hold

that the feeder line provisions of the Interstate Commerce Act can be read in isolation from the rest of the statute, which is prefaced by, *inter alia*, a concern for effective rail competition.

The most protection from the pro-competition rail policy which is afforded feeder line sellers is found in 49 U.S.C. Section 10910(c)(1), which only applies to a portion of the Tyson line but not at all to that sought by Cheney. There, it is provided that an incumbent rail carrier should only be required to sell its rail line if to do so would not result in either "a significantly adverse financial effect" or "an adverse effect on the[ir] overall operational performance." 49 U.S.C. § 10910(c)(1)(C) and (D). Plainly,

Congress, by enacting those provisions, sought to prevent use of the feeder line statute in those instances where the incumbent rail carrier would be crippled by loss of the subject line. Given Congressional concern for effective rail competition, however, those provisions cannot and should not be read, as the court below did, as a mandate for the Commission to completely protect carriers required to sell their lines under the feeder line program from any and all competition from purchasers.

Even more unsupportable is the court's determination that competition is an irrelevant consideration under the remainder of the statute, which applies to the entirety of the line sought by Cheney.

There is not an iota of evidence that Congress, when it crafted the feeder line statute, intended that the normal constraints on Commission action, the National Rail Transportation Policy factors, be removed during feeder line proceedings. The feeder line statute is no different than any other power that has been granted to the Commission.

At a minimum the court should have attempted to reconcile its interpretation of 49 U.S.C. Section 10910 with the National Rail Transportation Policy factors. Courts, when faced with seemingly conflicting statutes or provisions, have long been expected to attempt to reconcile the conflict and reach a reasoned judgment as to which to

apply, not simply apply one provision while ignoring the other. *See United States v. Morse*, 95 U.S. 760, 763 (1877). This should be particularly true in the case of the Interstate Commerce Act, given the preeminence of the National Rail Transportation Policy factors.[35]

The court below failed to review the ICC's actions against the express standard given by Congress--the National Rail Transportation Policy. Instead, the court supplied its own mistaken interpretation of the feeder line statute, which conflicts with Supreme Court precedent and precedent of other circuits. But most

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[35]Often times the policy factors themselves, because they express legislative purposes in broad generalizations, will overlap, or even conflict, in which case the Commission balances the public interests inherent in each of the factors in reaching its decision. *See ICC v. Parker*, 326 U.S. 60, 66 (1945).

grievously, the court below provided the Commission with an imprimatur of legitimacy for reading other sections of the Interstate Commerce Act as being unaffected by the express pro-competition policy of Congress in the National Rail Transportation Policy. The Court should grant this petition to make plain the fact that amendments to the Interstate Commerce Act are to be construed and implemented with regard to the guidelines established by Congress in its formulation of the National Rail Transportation Policy, just as the Act itself has been so construed and implemented since 1940.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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